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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARCK BRIAN-MENECE VASQUEZ, Defendant and Appellant.	H034623 (Santa Cruz County Super. Ct. No. WF00305)

Defendant Marck Brian-Menece Vasquez was convicted after court trial of lewd conduct upon a child (Pen. Code, § 288, subd. (a))[1] and misdemeanor exhibiting harmful matter to a minor (§ 313.1, subd. (a)). The court sentenced defendant to six years in prison and imposed a $1,140 fine pursuant to section 290.3. In his opening brief on appeal, defendant contends that there is insufficient evidence to support the section 313.1 conviction and that the court erred in imposing the $1,140 fine. In his reply brief, defendant concedes that the $1,140 fine was correctly calculated. As we disagree with defendant's remaining contention, we will affirm the judgment.

[1] All further statutory references are to the Penal Code.

BACKGROUND

Defendant was charged by information with aggravated sexual assault of a child under 14 (§ 269, subd. (a)(4); count 1), lewd conduct upon a child (§ 288, subd. (a); count 2), and felony exhibiting harmful matter to a minor (§ 288.2, subd. (a); count 3). On June 22, 2009, defendant waived his right to a jury trial on condition that count 1 be dismissed. The court accepted the waiver and dismissed count 1 in the interest of justice.

The Trial Evidence

On May 21, 2008, the Santa Cruz County Sheriff's Office learned that J., a student at the California School for the Deaf in Fremont, had reported to her teacher that her uncle had inappropriately touched her. J. was a fourth grade student who lived at the school from Sunday night through Friday, and was bused home to Watsonville Friday afternoon. J. can hear and speak a little, but she speaks very softly because her hearing aid makes her sound loud to herself. She uses sign language at school. J. was interviewed by a sheriff's detective using an American Sign Language interpreter, and the interview was videotaped. Defendant was arrested on May 23, 2008.

J.'s mother R. was married to defendant's brother. Defendant lived with his brother, R., their children, and some of their other family members while defendant's brother and R. were married. When R. and defendant's brother separated, R. and defendant began a relationship. J. did not like defendant and she did not want her mother to have a relationship with him. R. and defendant moved to separate residences in September 2007, but began dating again in 2008.

A few weeks before defendant's arrest, when defendant and R. were no longer living together, R. asked J. why she did not like defendant. J. told R. that defendant had spanked her once years before when J. was six or seven, and that he had "made her watch" "porn, the porn video" that J. had seen in his box. A few years before this discussion, J. had told R. that she had found two pornographic videos in a box of defendant's possessions that he had kept in their home, and R. had "had the sex talk with

[J.]" when "[s]he was fairly young." R. knew that defendant had the pornographic movies in his box and she had heard him watching them sometimes when she was trying to sleep and J. was not home. J. did not say that defendant had molested her. R. asked defendant about J.'s report of having to watch the video, but defendant said that there was no way he would do that.

J. testified that one evening when she was nine or ten, and they were visiting a cousin in Delano, her mother left to do the laundry. J. was watching television in her pajamas and fell asleep on the couch. Defendant sat down next to her and touched her body. He picked her up and placed her between his legs. She could feel his penis on her "private place" through her pajamas. She told him that she did not like it and he laughed. She got off the couch and yelled at him, her mother returned, and she told her mother what happened. Her mother asked defendant if anything happened, and he denied that it had. Defendant did not try to touch J. again that night, but she felt hurt.

At the time of the Delano incident, J. lived with her mother, her baby sister, and defendant in a farmhouse in Watsonville when J. was home from school. They all shared one bedroom, and J. slept on the floor. One night, when her mother and sister were out shopping, defendant locked the bedroom door and put a movie in the DVD player. J. asked him what the movie was about and he said nothing. She did not like the movie. It had "sex and naked people. Naked people were doing something in the backyard." There were both men and women in the movie, and one woman had black, shoulder length hair. She remembers seeing "a woman naked and a man smoking." She tried to not watch the movie by looking away but defendant kept turning her head back so that she faced the screen. She tried to cover her face with her hands but he blocked them from going to her face. The movie continued playing until her mother returned home. Then, defendant turned off the DVD and television and unlocked the bedroom door. When J.'s mother came into the bedroom, J. told her mother what had happened but

defendant denied it. Her mother believed defendant. J. talked to her father, but he told her that if she avoided defendant it would not happen again.

One night, when J. was sleeping on the bedroom floor and her mother was in bed, defendant moved close to J. and pulled her closer to him. She pushed him away. He pulled the covers over them, pulled his shorts down, and put his hands on her head. He pushed her head down towards his genitals and put his penis inside her mouth.[2] She pushed him away, got up, and moved to the bed with her mother. She tried to tell her mother what happened but her mother either did not understand her or believe her, and she did not know what to do. She kept all the incidents to herself for a long time until she decided to talk to a friend at school whom she thought would believe her. She told her friend about "the movies" and about defendant touching her body. It was her friend's idea to tell her teacher.

J.'s grandmother, R.'s mother, testified on defendant's behalf that J.'s attitude towards defendant changed when he and R. started dating. J. would be mean to defendant and give him "dirty looks." J. obviously did not want her mother and defendant to be together, but J. never acted as though she was afraid of defendant. When J.'s grandmother first heard about J.'s allegations against defendant, she was shocked. In her opinion, J. "can lie just like any other kid, or she can tell the truth just like any other kid."

Defendant testified in his own behalf[3] that he and J. got along when they first met. One night when defendant lived in the same house with his brother's family and R.'s family, he saw R.'s brother watching an adult video in the garage while J. was lying on

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[2] When announcing its verdicts, the court stated that it considered J.'s testimony about this incident "as Evidence Code Section 1108 evidence only."

[3] Defendant admitted that he had been arrested for, and pleaded guilty to, giving a false name to a police officer in February 2004.

the floor. Defendant told R. about it the following day and he saw that J. did not go in there anymore. Once, when defendant was babysitting J., he spanked her on her butt because she kept turning the sound up on the television after he turned it down several times. After R. and defendant's brother separated and defendant began dating R., J.'s behavior towards defendant changed. She always looked at him in an angry way and behaved badly. He felt as though she disliked him. After he and R. moved in together, he was never left alone with J. when she was at home. He kept three "adult movies" in a box in their shared bedroom with his other personal effects, such as photographs, lotions and underwear. He never watched the movies in front of J., nor did he ever force her to watch one "[b]ecause it is not correct for a child to be watching adult movies." He was alone with J. for only 10 or 15 minutes during their trip to Delano. He did not pick her up and put her on top of him or touch her in any way. He believes that J. is saying these things about him in order to separate him from R. and because she thinks he is responsible for her parents' separation.

Neither the prosecution nor the defense presented to the court copies of the videos or DVDs that defendant had kept in his box of personal effects.

Verdicts and Sentencing

On June 26, 2009, the court found defendant guilty of count 2 (§ 288, subd. (a)) beyond a reasonable doubt based on the incident in Delano. As to count 3 (§ 288.2, subd. (a)), the court found that there was sufficient evidence to overcome the issue in *People v. Dyke* (2009) 172 Cal.App.4th 1377 (*Dyke*). However, there was not sufficient evidence that the movie was shown "with the intent to seduce the minor." Therefore, the court found defendant not guilty of the charged felony offense but guilty of the lesser included misdemeanor offense under section 313.1, subdivision (a).

On August 19, 2009, the court denied defendant's request to place him on probation and sentenced defendant to the middle term of six years on count 2. On count 3, it imposed a concurrent six-month jail term, with credit for time served. It

ordered defendant to register as a sex offender under section 290, and ordered him to pay various fines and fees, including a "$1,140 fine pursuant to Penal Code Section 290.3."

DISCUSSION

Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support his conviction under section 313.1, subdivision (a), as the evidence was insufficient to show that the movie J. testified he made her watch was "harmful matter" within the meaning of the statute. "The evidence was insufficient to show that it 'appeals to the prurient interest.' The evidence was insufficient to show that the movie 'depicts or describes in a patently offensive way sexual conduct.' And the evidence was insufficient to show that the DVD 'taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.' "

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact] not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt.

‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.]” ’ [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

“Harmful matter” as used in section 313.1, subdivision (a) incorporates the definition from section 313, subdivision (a): “ ‘Harmful matter’ means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” “This definition essentially tracks the three-pronged test for obscenity articulated in *Miller* [*v. California* (1973) 413 U.S. [15,] 24 [(*Miller*)]: ‘[1] whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; [2] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [3] whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value . . . .’ ” (*People v. Hsu* (2000) 82 Cal.App.4th 976, 992.) The consideration of contemporary statewide standards, rather than general community or national standards, is constitutionally permissible. (*Miller, supra*, 413 U.S. at p. 31.)

Under *Miller*, the question of what appeals to the “prurient interest” or is “patently offensive” under the community standard obscenity test is essentially a question of fact subject to independent review. (*Miller, supra*, 413 U.S. at p. 30; *Bose Corp. v. Consumers Union of U.S., Inc*. (1984) 466 U.S. 485, 506-508.) Thus, we independently determine whether the DVD in question was of a character to appeal to the prurient interest or to be patently offensive under contemporary statewide standards. Under this test, “the primary concern” is that the movie be “judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally

insensitive one." (*Miller, supra*, 413 U.S. at p. 33; see also, *People v. Wiener* (1979) 91 Cal.App.3d 238, 245.)

Under sections 313, subdivision (a), and 313.1, subdivision (a), the material being displayed to the minor must lack serious literary, artistic, political, or scientific value *for minors*. " '[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. [Citation.]' [Citation.]" (*Miller, supra*, 413 U.S. at p. 36, fn. 17.) "In essence, then, to fall within the terms of [section 313.1, subdivision (a)], the material exhibited to the minor must be 'obscene' as defined by *Miller*, except that its socially redeeming values must be of a nature that can be appreciated by a minor. (*Miller, supra*, 413 U.S. at pp. 23-24.) If this test is not met, there is no violation of [that statute] even if the other elements of that statute are met." (*Dyke, supra*, 172 Cal.App.4th at p. 1383, fn. omitted.)

In *Dyke*, the only evidence offered that the material viewed by the minor met the "harmful matter" test was the testimony of the minor as "no tangible evidence [was] introduced at trial of precisely what [the minor] saw." (*Dyke, supra*, 172 Cal.App.4th at p. 1384.) The minor testified that while the defendant was flipping through channels on television, the minor saw a naked female dancing for several minutes, and a man and woman unclothed from the waist up " 'having sex' " for about 45 seconds. The lower portion of the couple could not be seen, but the woman was " 'on top.' " (*Ibid*.) The minor characterized what she saw as "pornography." (*Id*. at p. 1386.) The appellate court concluded that there was insufficient evidence in the record to hold that the television images as described by the minor met the test for harmful matter. (*Ibid*.) Nudity or nude dancing alone cannot be deemed obscene even as to minors, and " 'sex and obscenity are not synonymous.' " (*Id*. at p. 1385, citing *Roth v. United States* (1957) 354 U.S. 476, 487.) "Without more, neither we nor the [trier of fact] are permitted to

presume that such content is patently offensive to the average adult, applying statewide community standards." (*Dyke*, *supra*, 172 Cal.App.4th at p. 1385.)

In this case, as in *Dyke*, the video/DVD at issue was not introduced into evidence. J. testified that the DVD that defendant made her watch even though she did not like it depicted "sex and naked people. Naked people were doing something in the back yard." She also testified that it had both men and women in it and that there was "a woman naked and a man smoking." However, J.'s testimony was not the only evidence regarding the "harmful matter" that was presented at defendant's trial. R. testified that J. told her that defendant made her watch "porn, the porn video" that J. had previously told R. she had discovered in defendant's box of personal effects. R. also testified that she knew that defendant kept pornographic movies in the box, and that she had discussed what sex is with J. when J. was fairly young. In addition, defendant testified that the movies he kept in his box of personal effects were "adult movies" that "it is not correct" for a child to watch. The Attorney General contends that this is sufficient evidence to support defendant's conviction for violating section 313.1, subdivision (a), and we agree.

Nudity and sexually graphic scenes such as those testified to by J. are found in many movies that cannot be classified as obscene or pornographic, and there is little in the record from which to judge whether there was any serious literary, artistic, political, or scientific value for minors in the movie that defendant made J. watch even though she did not like it. (See *Dyke*, *supra*, 172 Cal.App.4th at p. 1385.) In *Dyke*, the record did not include any testimony by an adult that could corroborate the minor's testimony. However, in this case, R., an adult, described defendant's movies as "porn," which is by itself some evidence that the movies were pornographic or obscene. And, defendant himself described the movies as "adult movies" that "it is not correct" for a child to watch, which is evidence from which a trier of fact could reasonably infer that the movies would be objectionable for minors under contemporary statewide standards. Where the Legislature and the adult community in general considers a movie so harmful and

offensive to minors as to preclude their access to them, we do not believe that any more evidence than what was presented in this case is necessary to establish that defendant displayed "harmful matter" to J. within the meaning of section 313.1, subdivision (a). After viewing the evidence in the light most favorable to the prosecution, as we must (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11), we find that the evidence was sufficient to support defendant's conviction on count 3.

The Section 290.3 Fine

In his opening brief on appeal, defendant contends that the trial court miscalculated the $1,140 fine under section 290.3, because the statutory fine of $300 plus the penalty assessments he identified added up to only $1,020. The Attorney General responded by identifying three additional mandatory penalty assessments that would make up the $120 difference between the ordered amount and the amount defendant contended was correct. In his reply brief, defendant concedes that the fine was correctly calculated. Accordingly, we need not further discuss defendant's claim.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MCADAMS, J.

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DUFFY, J.